STATE OF ILLINOIS
BEFORE THE ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion		
	:	**ICC Docket No. 11-0710**
In re Proposed Contracts Between Chicago Clean Energy, LLC and Ameren Illinois Company and Between Chicago Clean Energy, LLC and Northern Illinois Gas Company for the Purchase and Sale of Substitute Natural Gas Under the Provisions of Illinois Public Act 97-0096	**:**	

VERIFIED REPLY BRIEF ON EXCEPTIONS OF CHICAGO CLEAN ENERGY, LLC REGARDING THE APRIL 24, 2012 PROPOSED ORDER ON REHEARING

ORAL ARGUMENT REQUESTED

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Chicago Clean Energy, LLC ("Chicago Clean Energy" or "CCE"), by and through its attorneys, DLA Piper LLP (US), pursuant to Section 200.830 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), respectfully submits this Reply Brief on Exceptions regarding the April 24, 2012 Proposed Order on Rehearing (the "Proposed Order on Rehearing"). Attached hereto and made a part hereof as Attachment A[1] is further revised replacement language that Chicago Clean Energy respectfully requests that the Commission incorporate into its Final Order on Rehearing ("Replacement Language").

Chicago Clean Energy respectfully reiterates its request for an expedited Oral Argument. Based it the Briefs on Exceptions filed by the other parties, it continues to appear that Oral Argument would be useful to address the complex statutory framework, the threat to financeability

[1] The sourcing agreement included with Attachment A of this filing incorporates two minor errata from the version included as Attachment A to CCE's May 1, 2012 Brief on Exceptions to Rehearing: i) Section 5.2 "C", changed "plant" in first sentence to "Plant" to conform with Proposed Order on Rehearing and ii) Schedules 5.2A and 5.2B, changed headers to conform with Proposed Order on Rehearing.

posed by certain aspects of the Proposed Order on Rehearing, and related issues integral to the development of the Chicago Clean Energy project, including "billing determinants" and the percentage of costs recoverable under the sourcing agreement, provided that granting Oral Argument does not delay the Commission issuing a Final Order on Rehearing.

I.
INTRODUCTION:

Chicago Clean Energy continues to recognize and appreciate that the Proposed Order on Rehearing would modify the positions reflected in the Commission's January 10, 2012 Order ("January 10 Order") in a manner that would more closely comport with the relevant provisions of the Public Utility Act ("Act") and would move the project back toward viability. As stated in Chicago Clean Energy's Brief on Exceptions, the Proposed Order on Rehearing reflects additional constructive analysis and understanding of many of the underlying substantive issues, and Chicago Clean Energy continues to appreciate the time and efforts devoted to understanding these issues.

Chicago Clean Energy's Brief on Exceptions identified several items on which the Proposed Order on Rehearing continues to reach certain conclusions that undercut the feasibility of the development of the project, exceed the statutory framework of the Act that specifically dictates the scope of the Commission's duties in this proceeding, and conflict with the facts known to all parties who participated in the IPA-led mediation over the sourcing agreement. (*See* Brief on Exceptions at 3-4 (summarizing issues).) None of the arguments advanced by the Briefs on Exceptions of the other parties rebuts those points made by Chicago Clean Energy.

Notably, as with the process in earlier rounds of briefing, it appears that in some respects there continues to be an emergent understanding of the Commission's limited statutory role with respect to the IPA-approved final draft sourcing agreement and a resultant narrowing of issues

and additional consensus (or at least a lack of objection) in moving toward positions that would facilitate the financing of the Chicago Clean Energy project. Thus, for example:

- The Commission Staff does not challenge the Proposed Order on Rehearing's conclusion that a third-party guarantor provision relating to the customer savings should not be imposed into the IPA-approved final draft sourcing agreement, even though Staff originally advocated for imposition of such third part guarantee.

- Similarly, Staff defers to the position of the Illinois Power Agency ("IPA") with respect to the meanings and values of Annual Projected Output and Base Overage Amount, even though Staff previously took a contrary position. (*See* Staff Brief on Exceptions at 2-7.)

- Neither the Attorney General nor the IPA choose to file a Brief on Exceptions, signaling that they are not challenging the Proposed Order on Rehearing's conclusions, for example, regarding carbon sequestration issues or the modification of the "non-severability" provision (Section 14.20) of the IPA-approved final draft sourcing agreement.

- Nicor does not oppose conclusions in the Proposed Order on Rehearing regarding, for example, affirming the IPA's prior determination on Annual Output and Monthly Base Overage Amount, and removing the third-party guarantor provision.

- In the same vein, Chicago Clean Energy supports a number of the changes that Nicor suggested in its Brief on Exceptions, including in Nicor's Exceptions 1, 2, 7 and 9. These items are noted below in this Reply Brief on Exceptions.

Chicago Clean Energy appreciates that this rehearing process is moving toward a more limited number of contested issues. That is not to understate the importance of the remaining contested issues, however. Those contested issues, while more limited in number, are still critical to the project's development.

Chief among these issues is the question of **Cost Recovery Percentage.** The Proposed Order on Rehearing finds that the two utilities that who have opted to become Chicago Clean

Energy's counterparties to the sourcing agreement -- Nicor and Ameren -- should be responsible for no more than 84% of the costs associated with the Chicago Clean Energy project rather than 95.45%. The Proposed Order on Rehearing adopts the IPA's position that a "scrivener's error" occurred as the IPA addressed this issue. Chicago Clean Energy continues to strenuously contest that conclusion. (*See* CCE Brief on Exceptions at 3, 5-23.)

The Proposed Order on Rehearing also suggests that the Commission should impose requirements regarding **Capital Structure Reporting**. The imposition of these additional obligations is not justified by the Act or sound policy. The Proposed Order on Rehearing's rationale that "nothing substantively different" was presented on rehearing on this issue disregards that the clarifications made during the rehearing process that indicated that the January 10 Order's Capital Structure Reporting requirements were not within the Commission's authority under the Act and serve no meaningful purpose. (*See, e.g.,* IPA Initial Comments on Rehearing at 10; CCE Reply Comments on Rehearing at 3, 10.) All of the financial analysis that has been presented in the instant proceeding presumes that the capital structure is a 70/30 debt-to-equity split; Chicago Clean Energy respectfully requests that this ratio be recognized in the Commission-approved Sourcing Agreement. (*See* CCE Brief on Exceptions at 3-4, 24-26.)

The Proposed Order on Rehearing also contains erroneous conclusions regarding **Scrivener's and Typographical Errors**. Most importantly, the finding that the Cost Recovery Percentage should be 84% rather than 95.45% based on an alleged scrivener's error by the IPA is factually inaccurate. In addition, the Proposed Order on Rehearing's finding that only those scrivener's and typographical errors identified by the IPA require correction (*see* Proposed Order on Rehearing at 44) is incorrect. (*See* CCE Brief on Exceptions at 4, 26-27.)

The Proposed Order on Rehearing indicates that the Commission is taking no position regarding the constitutionality of the Public Act 97-0630. However, Nicor has waived its right to raise a constitutional challenge. The Proposed Order on Rehearing should be modified to note that waiver or, at a minimum, to clarify that the Commission is taking no position on whether a waiver has occurred. (*See id.* at 4, 28-30.)

Finally, in order to avoid any potential ambiguity, Chicago Clean Energy respectfully requests that the Commission attach to its Final Order on Rehearing the text of the Sourcing Agreement that the Commission intends to approve. (*See id.* at 4, 30-31.)

No party has contested the enormous benefits afforded to Illinois by the Chicago Clean Energy project. (*See* EDI Verified Comments on Rehearing at 3-5; CCE Verified Reply Comments on Rehearing at 5.) The General Assembly has acted repeatedly and unequivocally through legislation and resolutions to both establish a legislative framework and communicate its support for the Chicago Clean Energy project. The issues now before the Commission on rehearing are relatively limited, but they are critically important to the development of the project. Accordingly, Chicago Clean Energy respectfully requests that the Proposed Order on Rehearing be modified consistent with the positions set forth herein and in Chicago Clean Energy's Brief on Exceptions.

II.

REPLY TO ECONOMIC DEVELOPMENT INTERVENORS

The Economic Development Intervenors highlight the undeniably important benefits that the Chicago Clean Energy project represents for Illinois and the risk to the project if the Commission's January 10, 2012 Order were not substantially revised. (*See* EDI Brief on

Exceptions at 1-2.) The Economic Development Intervenors also explain the statutory framework that guides the instant proceeding. (*See id.* at 2-10.)

A. The Benefits Of The Chicago Clean Energy Project

The Economic Development Intervenors are well-versed on the benefits of the CCE Project, and communicated these benefits clearly throughout the proceeding, most recently in their May 1 filing. (*See* EDI Brief on Exceptions at 1.)[2] The most prominent of these benefits -- the $3 billion of investment in the State, thousands of jobs, $1 billion in new tax revenue -- are well-understood and relatively straightforward to grasp. The Economic Development Intervenors also have highlighted environmental benefits of the project, such as the 99% reduction in emissions, remediation of a brownfield, and commercialization of carbon capture and sequestration ("CCS") technology which are less easily understood. (*See id.*) In particular, it seems that the 85% carbon capture and sequestration benefit often is not fully appreciated.

The General Assembly always envisioned that the clean coal SNG brown facility would capture and sequester the vast majority of CO2 emissions, going so far as to embed this requirement in the very definition of the facility:

> "Clean coal SNG brownfield facility" means a facility that … (4) captures and sequesters at least 85% of the total carbon dioxide emissions that the facility would otherwise emit.

(20 ILCS 3855/1-10 (incorporated by reference into the Act at 220 ILCS 5/3-123).) The Act further describes the Commission's role in the approval of a carbon capture and sequestration plan, and the means of enforcing this 85% requirement. (220 ILCS 5/9-220(h-5) ("Sequestration enforcement").) Thus, the framework has been created under which commercial scale CCS must

[2] Unless otherwise noted, all references and citations to any "Brief on Exceptions" refers to the indicated party's Brief on Exceptions on Rehearing filed on May 1, 2012.

be accomplished by the Chicago Clean Energy facility. Furthermore, this must be done under a plan to be developed with the Commission.

Current events have transpired which show the wisdom of this approach. On March 27, 2012, the US Environmental Protection Agency ("EPA") issued its "Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units" (EGUs). (*See* US EPA News Release of 3/27/2012, "EPA Proposes First Carbon Pollution Standard for Future Power Plants/Achievable standard is in line with investments already being made and will inform the building of new plants moving forward," available at http://tinyurl.com/7xsr27v.) The proposal is the clearest statement yet by EPA that new coal-fired power will only be constructed if it incorporates CCS technology. Simply put, the emissions requirements proposed by EPA effectively would outlaw new coal-fired electric generation that does not include CCS.[3]

It is the specific intent of the US EPA that CCS is the solution for using coal under these emissions standards:

> [B]y clarifying that in the future, new coal-fired power plants will be required to install CCS, this rulemaking eliminates uncertainty about the status of coal and may well enhance the prospects for new coal-fired generation and the deployment of CCS, and thereby promote energy diversity.

(US EPA Proposed Rule at 22430, PDF version available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2011-0660-0001.) In fact, the US EPA simply sees no

[3] The proposed US EPA rules specify an emissions limit of 1,000 lbs CO2 emissions per MWh of electricity produced. Current US coal-powered generation emits an average of 2,249 lbs/MWh; *See* http://www.epa.gov/cleanenergy/energy-and-you/affect/air-emissions.html

path forward for new conventional coal-fired generation to be built without CCS in the next two decades:

> Our IPM modeling, using Energy Information Administration (EIA) reference case assumptions, projects that **there will be no construction of new coal-fired generation without CCS by 2030**.

(*See id.* at 22395. (Emphasis added.))

Chicago Clean Energy recognizes that no new coal projects can move ahead without CCS. In fact, the CCE facility's "sister" project, known as Indiana Gasification (owned by a company with the same corporate parent as Chicago Clean Energy), was issued a proposed air permit on May 7, 2012 by the Indiana Department of Environmental Management ("IDEM"). (*See* IDEM web site, http://permits.air.idem.in.gov/30464p.pdf and Indiana Gasification press release at http://news.yahoo.com/world-class-coal-facility-advances-idem-proposed-permit-210405855.html.) The permit issued by IDEM to Indiana Gasification is a first-of-its-kind--containing binding limits on CO2 emissions, an absolute requirement to execute CCS, as well as exceedingly stringent limitations on conventional pollutants. The advancement of the Indiana project will help to develop the same pipeline infrastructure which likely will transport CO2 from the CCE facility for ultimate sequestration, and is a timely reminder of the commitment of Chicago Clean Energy to commercialize CCS.

This CCS infrastructure will be critical for future energy needs, as the emerging ban on new conventional coal-fired generation poses a serious challenge for Illinois, which generates 46.5% of its electricity from coal.[4] It therefore is incumbent upon Illinois, with is vast coal reserves and growing energy needs, to protect the State's ability to produce its own energy by

[4] *See* "State Electricity Profiles, Table 5. Electric Power Industry Generation by Primary Energy Source, 1990 Through 2010," available at: http://www.eia.gov/electricity/state/illinois/xls/sept05il.xls

deploying CCS technology. The Chicago Clean Energy project is precisely the catalyst needed to launch a home-grown CCS in industry in Illinois. Chicago Clean Energy intends to employ state-of-the-art gasification technology to capture and compress 85% of the CO2 emissions. Chicago Clean Energy and its partners intend to develop pipelines and injection sites for the safe transportation and sequestration of this CO2. The expertise and infrastructure developed in conjunction with the Chicago Clean Energy project will create the foundation for CCS to be a viable part of Illinois' energy future -- keeping jobs, economic development, and clean energy technology within Illinois.

Chicago Clean Energy respectfully requests that the Commission recognize the benefits to be realized with the Chicago Clean Energy project, including the critical need to move CCS forward at a commercial scale in Illinois, and approve a Proposed Order that enables the Chicago Clean Energy project to advance.

B. The Statutory Framework for the Chicago Clean Energy Project

After an extensive legislative vetting of the Chicago Clean Energy project – including a rigorous $10 million facility cost report conducted by a world-class engineering firm that was reviewed by the IPA and its outside experts – the General Assembly created a detailed statutory framework for clean coal SNG brownfield facilities to develop sourcing agreements with the utilities. (*See* 220 ILCS 5/9-220(h-1); *see also* EDI Brief on Exceptions on Rehearing at 2-9.)

The statutory framework provides that, in the first instance, a clean coal SNG brownfield facility is given the opportunity to negotiate a sourcing agreement with the utilities. In the event that the facility and the utilities are unable to agree upon terms, the IPA is to convene a mediation in an attempt to facilitate agreement. (*See id.*) As the final step, if that mediation fails to yield an agreement, the IPA is *required to* "revise the draft sourcing agreement as necessary to

confirm that the final draft sourcing agreement contains only terms that are reasonable and equitable." (*Id.*) Once the IPA modifies the final draft sourcing agreement, the IPA is to forward that agreement to the Capital Development Board and the Commission to develop and insert certain economic terms prescribed in the agreement under Section 9-220(h-3) and make limited, specific additional modifications under Section 9-220(h-4). (*See* 220 ILCS 5/9-220(h-3), (h-4).) Thus, the General Assembly gave the Commission a critical but very restricted role to play in developing the sourcing agreement. (*See id.*)

Nothing in the Act suggests that the Commission is to review the decision of the IPA, nor that the IPA can retroactively revise any of the terms of the final draft sourcing agreement. Nothing in the Act suggests that the Commission is authorized to impose additional conditions upon the facility. Nothing in the Act suggests that the Commission is authorized to freely modify the terms and conditions in the final draft sourcing agreement. To the contrary, the Act expressly limits the Commission's authority to insert numbers as authorized by Section 9-220(h-3) and modify the agreement only as explicitly authorized by Section 9-220(h-4). To the extent there was any question, the Senate adopted SR 585 (Totter-Cullerton) and the House adopted HR 755 (Colvin-Madigan), identical resolutions confirming the limited authority of the Commission. (Copies of SR 585 and HR 755 were attached as Attachment A to the March 13, 2012 Joint Motion in Limine of Chicago Clean Energy and the Economic Development Intervenors filed during this rehearing proceeding.)

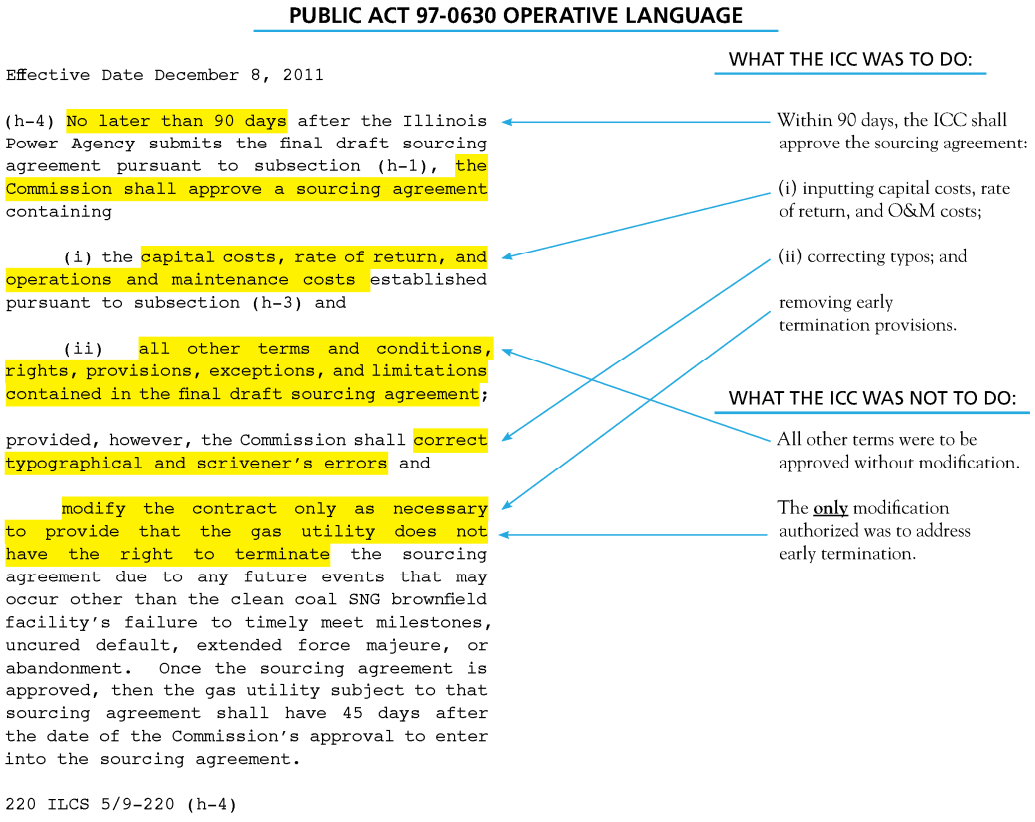
The statutory framework established by the General Assembly set forth a critical but limited role for the Commission to play in developing the sourcing agreement. After determining an appropriate rate of return for the project and overseeing the Illinois Capital Development Board's process to establish the capital and operations and maintenance costs for

the facility, the Commission's role was defined in Section 9-220(h-4) of the Act. Specifically, as outlined in Chicago Clean Energy's Application for Rehearing, the Commission lacks the statutory authority to modify the Billing Determinants, Annual Output, and the Monthly Base Overage Amount provisions in the IPA-approved final draft sourcing agreement. (*See* CCE Application for Rehearing at 8-9, 12-20.) The Commission also lacks the statutory authority to impose additional obligations on Chicago Clean Energy, including a Third Party Guarantor Requirement, a Capital Structure Reporting Requirement, and a Carbon Sequestration Provision Requirement. (*See id.* at 9-10; 20-26.)

The Commission is an administrative agency that was created by statute. As such, the Commission lacks any "implied powers" that would authorize it to act beyond the narrow confines of the Act. (*See Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 60, 923 N.E.2d 1259, 1268 (1st Dist. 2010), *aff'd* 955 N.E.2d 1110 (Ill. 2011) ("The Commission derives its power and authority solely from the statute creating it, and it may not, by its own acts, extend its jurisdiction."); *see also Harrison Tel. Co. v. Ill. Commerce Comm'n*, 343 Ill. App. 3d 517, 523, 797 N.E.2d 183, 189 (5th Dist. 2003) (same), *aff'd* 212 Ill. 2d 237, 817 N.E.2d 479 (2004). *See also Landfill, Inc. v. Pollution Ctl. Bd.*, 74 Ill. 2d 541, 554, 387 N.E.2d 258 (1978); *see also Nat'l Marine Serv. Inc. v. Ill. Env. Prot. Ag.*, 120 Ill. App. 3d 198, 205-206, 458 N.E.2d 551 (4th Dist. 1983).) Rather, the Commission's powers "are limited to those granted by the legislature, so that any action taken by the [Commission] must be specifically authorized by statute[,]" and to the extent any decision is made without statutory power, "that decision is void." (*Alvarado v. Indus. Comm'n*, 216 Ill. 2d 547, 553-54, 837 N.E.2d 909, 914 (2005).)

In determining its authority, the Commission should look first to the plain and ordinary meaning of the Act and must always presume that the General Assembly "did not intend to

create absurd, inconvenient or unjust results." (*See* Fisher v. Waldrop, 221 Ill. 2d 102, 112, 849 N.E.2d 334, 339 (2006).) As the Commission is aware, the terms of the Act that define the Commission's role were amended while the instant proceeding was pending before the Commission. (*See* P.A. 97-0630 amending 220 ILCS 5/9-220(h-4); CCE Application for Rehearing at 27-28.) Under the amended statute, the General Assembly provided guidance both regarding what the Commission is authorized to do, as well as what the Commission was not to do at this point of the sourcing agreement approval process. The graphic below points to the specific language in the revised Section 9-220(h-4):



In evaluating the construction of a statute such as Section 9-220(h-4), the primary objective is to ascertain and give effect to the intent of the General Assembly. (*See People v.*

Swift, 202 Ill. 2d 378, 385, 781 N.E.2d 292, 296 (2002).) The best indication of the General Assembly's intent is the plain statutory language itself. (*See id. See also Metro Utility Co. v. Illinois Commerce Comm'n*, 262 Ill. App. 3d 266, 274, 634 N.E.2d 377, 382 (2d Dist. 1997).) Clear and unambiguous terms are to be given their plain and ordinary meaning. (*See West Suburban Bank v. Attorneys' Title Insurance Fund, Inc.*, 326 Ill. App. 3d 502, 507, 761 N.E.2d 346, 349 (2d Dist. 2001).) Where statutory provisions are clear and unambiguous, the plain language as written must be given effect, without reading into it exceptions, limitations, or conditions that the General Assembly did not express. (*See Davis v. Toshiba Machine Co.*, 286 Ill. 2d 181, 184-85, 710 N.E.2d 399, 401 (1999).)

In this case, the statute is clear. Under the plain terms of P.A. 97-0630, which was passed with super-majorities in both chambers, and signed into law ***after*** the IPA approved the final draft sourcing agreement, to the extent there were ***any*** prior determinations made by the IPA (other than with regard to the early termination provisions), the Commission was not to modify those terms except as to correct typographical and scrivener's errors. That is, rather than giving the Commission additional authority to re-examine the terms , the General Assembly did the exact opposite, explicitly constraining the Commission's authority by requiring that the Commission approve "***all other terms and conditions***, rights, provisions, exceptions, and limitations contained in the final draft sourcing agreement [that was submitted to the Commission by the IPA]." (220 ILCS 5/9-220(h-4) (emphasis added).)

To the extent that the Commission finds there is any ambiguity in the plain terms of Section 9-220(h-4), the Resolutions passed by the Senate and the House provide additional guidance. (*See, e.g., Miller v. LaSalle Bank N.A.*, 595 F.3d 782, 790 (7th Cir. 2010) (subsequent

legislative pronouncements on an "unclear statute" are entitled to be "respectfully considered.").)

Each Resolution contains clear findings that:

- "[T]he Illinois Commerce Commission in reviewing and approving sourcing agreements was only to: (1) fill in the blanks in the final draft sourcing agreement based upon the previously established capital costs, operations and maintenance costs, and the rate of return for the Chicago Clean Energy project; (2) remove two statutorily unauthorized early termination provision from the final draft sourcing agreement; and (3) correct typographical and scrivener's errors;"
- "No statutory authority was given to the Illinois Commerce Commission to modify the terms of the final draft sourcing agreement or impose other obligations upon the Chicago Clean Energy project beyond the limitations set forth in Public Acts 97-0096 and 97-0630;"
- "The Illinois Appellate and Supreme Courts have consistently held that because administrative agencies are creatures of statute, they possess only those powers expressly delegated by law, and they may not act beyond their statutorily-delegated authority;" and
- "The Illinois Appellate and Supreme Courts have consistently held that public policy in Illinois is expressed by the General Assembly, and it is not the province of an administrative agency to inquire into the wisdom and propriety of the legislature's act or to substitute its own judgment for that of the legislature . . .."

(HR 755, SR 585.)

Based upon those findings, both the Senate and the House "express[ed] serious concerns" that the January 10 Order failed to adhere to the statutory framework for review of the IPA-approved final draft sourcing agreement, and urged the Commission to grant rehearing and, upon rehearing, to "reach a decision which reflects statutory directives and the intent of the Illinois General Assembly in passing Public Acts 97-0096 and 97-0630 . . .."

Taken together, all of these sources of authority confirm the Commission's critical but limited role in the overall statutory framework; within that context the Commission does not have authority to take any actions to modify the IPA-approved final draft sourcing agreement beyond those explicitly identified in Section 9-220(h-4).

III.

REPLY TO NICOR

Nicor's Brief on Exceptions addresses several important issues. On certain issues, Nicor accepts the Proposed Order on Rehearing. On other issues that Nicor addresses, Chicago Clean Energy agrees that Nicor's exceptions are valid. On several important issues, however, Nicor's position is incorrect and should be rejected. This is most notably the case with respect to Nicor's position that the Proposed Order on Rehearing properly found that Chicago Clean Energy should obtain cost recover of just 84% rather than the 95.45% plainly endorsed by the IPA-approved final draft sourcing agreement and the accompanying IPA memo issued contemporaneous with the IPA-approved final draft sourcing agreement. (*See* Nicor Brief on Exceptions at 2-5.) Nicor's position regarding the non-severability provision of Section 14.20 of the sourcing agreement is similarly invalid, particularly in light of the clear position of the General Assembly that Section 14.20 was to be removed from the sourcing agreement. (*See id.* at 5-8.)

Accordingly, Chicago Clean Energy replies to Nicor's Brief on Exceptions as follows.

A. Nicor's Brief On Exceptions Appropriately Accepts Many Conclusions In The Proposed Order On Rehearing

Importantly, Nicor does not oppose the conclusions in the Proposed Order on Rehearing regarding the following matters:

- Affirmation of the IPA's prior determination of Annual Output;

- Affirmation of the IPA's prior determination of Monthly Base Overage Amount;
- Removal of the requirement for a third-party guarantor for the consumer savings; and
- Inclusion of the Attorney General's compromise language into the Proposed Order on Rehearing, and the accompanying removal of Section 6.1(c) from the sourcing agreement.

Nicor's acceptance of the conclusions on these issues is noteworthy, and may demonstrate an emergent understanding of the limitations on the authority of the Commission to modify the IPA-approved final draft sourcing agreement. (*See* 220 ILCS 5/9-220(h-4); SR 585, HR 755.)

B. Chicago Clean Energy Supports Several Of Nicor's Exceptions To The Proposed Order On Rehearing

1. Nicor Exception #1 – Chicago Clean Energy Supports Nicor's Proposed Revisions to Section 5.2 "C" and Schedule 5.2C

Chicago Clean Energy agrees with the Nicor's proposed revisions to Section 5.2 "C" and Schedule 5.2C of the IPA-approved final draft sourcing agreement, as they were reflected in Nicor's Application for Rehearing. (*See* Proposed Order on Rehearing at 30.) In Nicor's Brief on Exceptions, Nicor suggests one further correction, to strike the "84% of" at the beginning of the clause "(i)" of Section 5.2 "C". CCE supports this correction. In fact, this correction was already reflected in the attachments to CCE's Brief on Exceptions. (*See* CCE Brief on Exceptions at Attachment A, attached Draft Sourcing Agreement at 22; Attachment C, attached Draft Sourcing Agreement at 23; and Attachment D, attached Draft Sourcing Agreement at 23.) Chicago Clean Energy also has fully incorporated Nicor's Exception #1 into the Replacement Language attached hereto and made a part hereof as Attachment A.

2. Nicor Exception #2 – Chicago Clean Energy Supports Nicor's Revisions To Better Reflect Nicor's Positions On Rehearing

Chicago Clean Energy is not opposed to Nicor's revisions to the description of its positions in the Proposed Order on Rehearing, and has incorporated those into its Replacement Language in Attachment A.

3. Nicor Exceptions #7 - #9 – Chicago Clean Energy Supports The Notion That The Appendices Should Be Consistent With The Terms Of The Sourcing Agreement And The Commission's Final Order On Rehearing

Chicago Clean Energy recognizes that the Appendix attached to the Proposed Order on Rehearing did not reflect the economic terms specified within the text of the Order, and supports Nicor's Exceptions #7 - #9 only to the extent that they advocate for self-consistency, but not based on the underlying assumptions.

While Chicago Clean Energy has shown clearly that both that the statutory framework provides for full cost recovery by the CCE facility, and that the IPA-approved final draft sourcing agreement unambiguously endorsed a compromise position of 95.45% cost recovery that was advanced by Chicago Clean Energy, the text of the Proposed Order on Rehearing provided for an 84% cost recovery percentage, while the Appendix suggested 100% cost recovery. Nicor's suggested corrections to the Appendix modify the formulas and quantities to reflect the 84% cost recovery, as well as to correct an error in the amortization formula. In fact, Chicago Clean Energy already had incorporated all of Nicor's Exceptions #7 - #9 in Aattachment D to its Brief on Exceptions to the Proposed Order on Rehearing, which reflected Chicago Clean Energy's understanding of the form of Sourcing Agreement intended by the Proposed Order on Rehearing. (*See* Attachment D to CCE Brief on Exceptions at Schedule 5.2A and Schedule 5.2B.)

C. Nicor Improperly Suggests That The Commission Should Reverse The Policy Determination Of The IPA To Accept Chicago Clean Energy's Compromise Position On The Billing Determinants Issue

It is significant that Nicor does not provide any support for the notion that the modifications to the billing determinants in the Proposed Order represent scrivener's errors on the IPA's part. Instead, Nicor's Brief on Exceptions simply suggests that "it was inappropriate to assign Nicor Gas and Ameren more than 84% of the capital costs and O&M costs of the CCE facility." (*See* Nicor Brief on Exceptions to Proposed Order on Rehearing at 3.) That is, Nicor continues to reiterate that it believes, as a policy matter, the IPA's conclusions on billing determinants simply was not an equitable treatment of its company, and should be modified by the Commission on that basis. Nicor's position is not surprising, since this was one of the ways

in which at the outset of this proceeding Nicor originally requested that the Commission modify the IPA-approved final draft sourcing agreement to include "poison pills" that would prevent the project from being financed; it would be a complete shift in position for Nicor to now suggest that the IPA's position was a scrivener's error.

As Chicago Clean Energy has repeatedly demonstrated, as a matter of policy, the IPA appropriately endorsed the compromise position of 95.45% cost recovery that was advanced by Chicago Clean Energy. Mathematically, the Proposed Order on Rehearing, if accepted by the Commission, would have the effect of the reducing the cost recovery by 11.45% compared to the IPA-approved final draft sourcing agreement (95.45% - 84%). As a matter of policy, the Commission should endorse the 95.45% cost recovery reflected in the IPA-approved final draft sourcing agreement. Chicago Clean Energy has explained that the Commission should reject Nicor's suggestion that the cost recovery for the facility be reduced, both as a matter of law and as a matter of policy. (*See* CCE Verified Comments on Rehearing at 20-26; CCE Reply Brief on Exceptions to the December 22 Proposed Order at 9-12; CCE Brief on Exceptions to the December 22 Proposed Order at 36-38.) Chicago Clean Energy reiterates that, for the following reasons, Nicor's arguments should be rejected:

- Chicago Clean Energy would experience an insurmountable shortfall in its capital and O&M recovery. In short, the uncontradicted evidence is that the project would become unfinanceable. (*See, e.g.,* CCE April 16, 2012 Verified Response Comments on Rehearing, Maley Affidavit at 5) ("the project cannot be financed with this level of cost recovery.").)

- The proposed reduction in cost recovery would have the direct effect of reducing the previously-approved base Return on Equity for CCE by 11.45%, thus violating the terms of the December 7 Interim Order, which set the base Return on Equity at 4.44%. (*See* December 7 Interim Order at 11 ("as required by Section

9-220(h-3)(1)(B) of the Act, a commercially reasonable base rate of return on equity should be set at 4.44%.").) The Act provides the Commission with *no authority* to alter the all-in capital recovery charge, but rather directs the Commission to set it according to the mechanical methodology required by the Act. (*See* 220 ILCS 5/9-220(h-3)(1)(A).) Significantly, no party requested rehearing of the Commission's December 7 Interim Order within the statutory deadline, and no party is suggesting that the Interim Order was in error. Nevertheless, the result advocated by Nicor is directly contrary to this unchallenged prior Commission Order on this issue. There is no legal or policy basis for the Commission to reverse its December 7 Interim Order.

- The result advocated by Nicor is also contrary to Section 9-220(h-3)(2) of the Act, which provides: "Operations and maintenance costs approved by the Commission **shall be recoverable** by the clean coal SNG brownfield facility **under the sourcing agreement**." (Emphasis added.) CCE's only assured means of recovering O&M costs is through the Commission-approved O&M Component of the sourcing agreement.

- Similarly, the result advocated by Nicor is contrary to Section (h-3)(1)(B) of the Act, which specifies that "Rate of return shall be comprised of the clean coal SNG brownfield facility's actual cost of debt, including mortgage-style amortization, and a reasonable return on equity." CCE's only assured way of recovering its actual cost of debt is through the capital recovery charge in the sourcing agreement.

Chicago Clean Energy also debunked several other assertions that Nicor made to suggest that the Commission has the authority to modify the billing determinants. For example:

- Contrary to Nicor's suggestion, Section 9-220(h-3)(1) cannot be read to imply that the Commission is authorized to modify the billing determinants. (*See id.*) Section 9-220(h-3)(1) references a "capital recovery charge" that is "approved" by the Commission and quotes a portion of the introductory language in that subsection. Under this provision, the approval by the Commission is simply a

combination of two components, it is not authority to modify the IPA-approved final draft sourcing agreement. This interpretation is consistent with the more general direction given the Commission in Section 9-220(h-4) to "approve" the sourcing agreement. (*See* 220 ILCS 5/9-220(h-4).) If the term "approve" were to include the implied authority to modify, then the Commission would have the authority to modify the entirety of the IPA-approved final draft sourcing agreement. However, there is no suggestion in the Act that the Commission is to examine or reconsider the billing determinants -- or any other contract term other than the early termination provisions -- that the IPA previously approved.

- If the General Assembly believed that it was improper for the IPA to decide the issue of billing determinants, it had the opportunity to direct the Commission to revisit this issue. However, rather than giving the Commission authority to modify the billing determinants, P.A. 97-0630 -- which was passed with super-majorities in both chambers, and signed into law ***after*** the IPA-approved final draft sourcing agreement was issued -- did the exact opposite, explicitly requiring that the Commission approve "***all other terms and conditions***, rights, provisions, exceptions, and limitations contained in the final draft sourcing agreement [that was submitted to the Commission by the IPA]." (220 ILCS 5/9-220(h-4).) The Resolutions that were subsequently adopted by both the Senate and the House likewise emphasized that the Commission was not to change anything in the IPA-approved final draft sourcing agreement that would impact CCE's ability to recover its costs. (*See* SR 585, HR 755 ("we express serious concerns that the Illinois Commerce Commission Order entered on January 10 . . . modifies the final draft sourcing agreement with respect to recovery of costs despite the Commission lacking statutory authority to do so and despite the statutory language and legislative intent of Public Act 97-96 to provide full cost recovery to the Chicago Clean Energy project . ...").)

- Nicor's "cost causation" argument that -- while potentially appealing on its surface for its simplicity -- disregards the complexity of the compromise embodied in the Act and the IPA-approved final draft sourcing agreement. In

advancing the utility ratemaking principle of cost causation, Nicor ignored the non-utility construct of the Sourcing Agreement, which includes Nicor's and Ameren's customers receiving 100% of the benefits associated with a $100 million customer savings guarantee and a revenue sharing mechanism. (*See* Nicor Statement of Position at 7.) Furthermore, Chicago Clean Energy explained at length why the cost causation principle that is used to analyze utility rates for utility facilities, is inapplicable in this proceeding. (*See* CCE Verified Comments on Rehearing at 25.)

- Nicor's imaginary hypothetical that Nicor could have potentially been stuck with 100% of the costs of the CCE project if Nicor were the only participating utility does not provide a basis to limit Chicago Clean Energy's cost recovery. (*See* January 10 Order at 21-22; Nicor Gas Statement of Position at 8.) Not only does Nicor's imaginary hypothetical ignore the reality that Ameren has committed to participation, it ignores the other changes that would occur in this alternative universe. (*See* 220 ILCS 5/9-220(h-1).) For example, the Commission could have taken this circumstance into account in adjusting the rate of return for the facility. Finally, Chicago Clean Energy presented uncontradicted evidence that the project would not have moved forward if Nicor was the only participating utility. (*See* Affidavit of Donald W. Maley, Jr. at ¶ 8, attached as Attachment B to CCE's Verified Comments on Rehearing.)

Again, Nicor's position in its Brief on Exceptions does **not** support the IPA's current claim, reflected in the Proposed Order on Rehearing, that a scrivener error occurred with the billing determinants. In fact, any modification of the billing determinants along the lines now proposed by Nicor would require the Commission to claim an authority which does not exist in statute. Further, even assuming the Commission possessed the authority to review the billing determinant provisions in the IPA-approved final draft sourcing agreement, which it does not, it would be inappropriate to limit the facility's cost recovery as proposed by Nicor.

D. Chicago Clean Energy Opposes Certain Of Nicor's Exceptions To The Proposed Order On Rehearing, Which Are Either Unnecessary Or Unjustified

Certain of Nicor's exceptions should not be implemented, because they are either unnecessary or unjustified.

1. Nicor Exception #3 – Nicor's Suggestion To Revise Certain Schedules Is Unnecessary

Chicago Clean Energy opposes Nicor Exception #3, which seeks to require Chicago Clean Energy to revised Schedule 5.2A and 5.2B. (*See* Nicor Brief on Exceptions at 8.) Chicago Clean Energy's proposed replacement language already incorporates the underlying motive for Nicor's Exception #3. Chicago Clean Energy takes the position that the Proposed Order on Rehearing should specifically include not only Schedule 5.2A and Schedule 5.2B, but also a full version of the final sourcing agreement, and has incorporated that position into its replacement language in Attachment A. Accordingly, the paragraph modified by Nicor in its Exception #3 is extraneous and is not included in CCE's Replacement Language.

2. Nicor Exception #4 – Nicor's Objection To The IPA-Suggested Modification Of Section 14.20 Lacks Merit

Chicago Clean Energy opposes Nicor Exception #4, which seeks to undo the Proposed Order on Rehearing's adoption of the IPA-approved position to modify Section 14.20 of the sourcing agreement. (*See id.* at 5-8.) No party other than Nicor now opposes the modification to Section 14.20 resulting from the Proposed Order on Rehearing -- including parties who formerly did oppose removal of Section 14.20. (*Compare,* Ameren January 3, 2012 Reply to Brief on Exceptions at 2-3 (opposing removal of Section 14.20) *with* Ameren Brief on Exceptions (not commenting on this provision in the Proposed Order).)

Chicago Clean Energy has explained repeatedly the statutory basis for a modification of Section 14.20. (*See, e.g.,* CCE December 28, 2011 Brief on Exceptions at 42-44; CCE

Application for Rehearing at 27-28; CCE Verified Comments on Rehearing 40-45.) Nicor's Brief on Exceptions fails to acknowledge those arguments, and instead suggests the odd position that Section 14.20 does not provide a utility with a "right" to terminate the sourcing agreement, but rather suggests that Section 14.20 provides something *other than* a "right" because Section 14.20 "describes the automatic consequence if there is a determination of invalidity." (Nicor Brief on Exceptions at 5.)

Nicor's parsing of words rings hollow. First, Senate Resolution 585 and House Resolution 755 plainly communicate the General Assembly's intention that Section 14.20 was one of the "unauthorized early termination provisions" that the General Assembly intended to be deleted as a result of Public Act 97-0630. Nicor simply ignores those Resolutions.

Second, even if the Resolutions did not call for the removal of Section 14.20, Nicor's notion that Section 14.20 would be automatically self-executing ignores reality. If there were a situation where Nicor or another utility were attempting to "exit" the sourcing agreement as a result of a court finding that arguably triggered Section 14.20, that would not occur "automatically." Section 14.20 is a non-severability provision that effectively would grant parties an avenue to terminate the agreement if one or more of the contractual provisions were invalidated. However, that termination result would not occur without Nicor or another utility *exercising its right* under that provision in light of a triggering event. This is exactly why the provision was identified by the General Assembly as a termination provision that should be removed from the sourcing agreement.

Nicor's remaining argument ignores these facts and sets up the "straw man" argument that Section 14.20 can only be removed as a typographical or scrivener's error. (Nicor Brief on

Exceptions at 6-8.) That argument should be rejected out of hand as it ignores the express terms of Public Act 97-0630 and the legislative intent as reflected in the Resolutions.

3. Nicor Exception #5 – Nicor's Proposed Re-wording Is Unnecessary

Chicago Clean Energy opposes Nicor Exception #5, which appears to try to modify the Proposed Order on Rehearing's concise, neutral description of parties' positions into a statement that implies some Commission analysis regarding those positions.

4. Nicor Exception #6 – Nicor's Suggestion That The Commission Deliver A Version Of The Sourcing Agreement Is Unnecessary

Chicago Clean Energy opposes Nicor's Exception #6 specifically as written, while supporting the general idea that the Final Order on Rehearing should deliver an explicit version of the final ICC-approved sourcing agreements. Chicago Clean Energy's replacement language, provided here in Attachment A, states that the final sourcing agreement is attached in its entirety (rather than just Schedules 5.2A and 5.2B as Nicor's language indicates), and therefore essentially subsumes Nicor's intent.

E. Nicor's Brief On Exceptions Confirms That Nicor Has Waived Its Argument That Public Act 97-0630 Is Unconstitutional

Nicor fails to make any further arguments in support of its purported challenge to the constitutionality of Public Act 97-0630. Similarly, no other party has supported or advanced this claim. Nicor's additional silence on this issue confirms its waiver of the right to challenge constitutionality. Although Nicor alluded to a constitutional challenge in its Initial Comments on Rehearing, no substantive argument was provided, and through its Brief on Exceptions it continues to be the case that Nicor has provided no argument or legal authority for any allegation of unconstitutionality, beyond summarily listing several clauses of the Illinois and United States Constitutions. (*See* Nicor Initial Comments on Rehearing at 9.) Thus, it continues to be the case

that Chicago Clean Energy has been prevented from responding substantively to Nicor's naked allegation of unconstitutionality because, as Nicor itself acknowledged, Nicor provided no substantive argument about Public Act 97-0630 constitutionality, instead invoking the boilerplate language about "preserv[ing] the issue for appeal." (*Id.*)

As explained in detail in Chicago Clean Energy's Brief on Exceptions, Nicor's approach is insufficient to raise a constitutional challenge or even to "preserve" such a challenge for some theoretical future litigation. (*See* CCE Brief on Exceptions at 28-30.) Accordingly, the Proposed Order on Rehearing should be modified to acknowledge Nicor's waiver of any constitutional arguments. (*See id.* at 28.) Alternatively, and at a minimum, the Proposed Order on Rehearing should be modified to clarify that the Commission is not taking on whether Nicor has waived its constitutional arguments on appeal as a result of its failure to specify the basis for any constitutional challenge at the Commission level. (*See id.*)

IV.

REPLY TO STAFF

Significantly, Staff does not oppose the conclusions in the Proposed Order on Rehearing regarding the following matters:

- Affirmation of the IPA's prior determination of Annual Output;
- Affirmation of the IPA's prior determination of Monthly Base Overage Amount;
- Removal of the requirement for a third-party guarantor for the consumer savings; and
- Inclusion of the Attorney General's compromise language into the Proposed Order on Rehearing, and the accompanying removal of Section 6.1(c) from the sourcing agreement.

(*See generally* Staff Brief on Exceptions to Proposed Order on Rehearing.) Staff's Brief on Exceptions focuses on the determinations of the values for Projected Annual Output and Base Overage Amount originally approved in the IPA final draft sourcing agreement and affirmed in the Proposed Order on Rehearing. Staff repeatedly makes the point that although it disagreed with the IPA regarding the Projected Annual Output and Base Overage Amount earlier in this proceeding, at this stage, Staff is deferring to the IPA on these points. (*See id.* at 2-3.) Staff's proposed additional language appears intended merely to clarify that Staff previously questioned certain items on which it now defers to the IPA. (*See id.* at 6-7.) Although Chicago Clean Energy disagrees with the basis for Staff's prior disagreement with the IPA on the Projected Annual Output and Base Overage Amount, Chicago Clean Energy appreciates Staff's ultimate position that Staff is not challenging the conclusions reached by the IPA and supported by Chicago Clean Energy.

Staff's Brief on Exceptions suggests that Staff's earlier recommendation for reducing the anticipated Annual Output of the facility was based upon Staff's extrapolations of a single number in a single summary document that was part of the Chicago Clean Energy Facility Cost Report. (*See id.* at 3.) Importantly, Staff appears to concede the IPA's deep understanding of that Facility Cost Report, and that the IPA-approved final draft sourcing agreement contained the definitive determination of the Annual Output of the Chicago Clean Energy facility. Therefore, Staff concludes that the figure of 47,799,714 MMBtu should be the Projected Annual Output reflected in the Final Order on Rehearing. (*See id.* at 6-7).

While Staff appropriately ultimately defers to the IPA on the determination of the Projected Annual Output, some of the statements made in Staff's Brief on Exceptions merit a response. Staff has not performed any type of analysis of the full Facility Cost Report (and, in

fact, was never directed to under the Act). In Staff's filing, a single "***output***" figure from the Facility Cost Report summary is multiplied by 365, and then compared to the IPA-approved projected annual output. (*See id.* at 4.) Staff's approach is erroneous.

The primary flaw of Staff's approach is that the figure selected from the report is not a quantity representing anticipated ***annual output*** -- rather, it is a quantity representing the ***vendor-guaranteed output*** at the lowest level of seasonally-adjusted performance. As would be expected, the projected output for the facility is substantially higher than the vendor-guaranteed capacity, when operated under standard industry practices, and higher still when seasonally adjusted.

The Commission should be confident that the IPA properly set the Annual Output at 47,799,714 MMBtu in the IPA-approved final draft sourcing agreement. This value was derived by starting with this vendor-guaranteed production of the facility, as described by Black & Veatch in the Facility Cost Report, and overlaying that with real-world experience of gasification operators at current facilities using the same technology, and accounting for all other bottlenecks and constraints. The Annual Output value of 47,799,714 MMBtu was vetted by the IPA and its independent engineers as part of its review of the Facility Cost Report, leaving no legitimate basis to challenge the conclusion of the analysis underlying this component in the IPA-approved final draft sourcing agreement. (*See* IPA Memo at 17.)

Further, the methodology used by the IPA to set the Annual Output for the Chicago Clean Energy project is consistent with the methodology used by the IPA to set the projected output for the Power Holdings clean coal SNG facility -- which uses the same technology. (*See* CCE Brief on Exceptions at 27, 28-29, Exhibit C.) Significantly, neither Nicor nor Ameren challenged the IPA decision with regard to Power Holdings. To the contrary, Nicor and Ameren each agreed to

enter into a contract that had at its foundation the identical analysis of the projected annual output that is the was used in the IPA-approved final draft sourcing agreement.

Although Staff no longer questions the IPA's position, Staff suggests that it was compelled to conclude in its earlier analysis that the IPA-approved value of 47,799,714 MMBtu for anticipated annual output was a scrivener's error, because same IPA memo contained two apparent other scrivener errors. (*See* Staff Brief on Exceptions at 4-5.) One of these errors has to do with a conversion of MMBtus to bcf in the memo (which shows a 1% discrepancy in an implied heating value for the SNG), and the other is the insertion of a dollar sign in front of a volumetric value. Chicago Clean Energy agrees that both of these are errors in the IPA memo, but also that they are easily reconcilable in the context of the rest of the memo without having the slightest effect on its conclusions. No parties other than Staff have ever even mentioned these scrivener's errors, much less suggested these errors invalidated any IPA decision. In any case, Staff's logic is flawed: the existence of these two minor errors does not undermine any fundamental conclusion in the IPA memo or the IPA-approved final draft sourcing agreement. To Staff's credit, at the end of the day, Staff defers to the IPA and concludes that there clearly there was no scrivener's error in setting this value. (*See* Staff Brief on Exceptions at 6-7.)

Although Chicago Clean Energy does not believe the language proposed by Staff on pages 6 and 7 of its Brief on Exceptions is imperative, Chicago Clean Energy does not object to that replacement language from Staff, except for a paragraph which mischaracterized the magnitude of the scrivener's errors in the IPA memo. Thus, Chicago Clean Energy does not object to the first paragraph of replacement language proposed by Staff at page 6 of Staff's Brief on Exceptions for inclusion at the end of sub-section III.E of the Proposed Order:

> In its Brief on Exceptions, Staff clarified its position with respect to the projected output of the CCE facility. The Staff noted that the IPA made it clear during rehearing that 47,799,714 was and is the value that the IPA intended to adopt. , Staff elects to defer to the IPA in this matter, in light of the IPA's role as scrivener.

(Staff Brief on Exceptions at 6.) However, Chicago Clean Energy objects to the second paragraph suggested by Staff, especially the implication that the minor scrivener's errors in the IPA memo supported a dramatic lowering of Chicago Clean Energy's projected annual output. Staff's proposed paragraph states the following:

> However, in doing so, Staff notes that it pointed out what appear to have clearly been scrivener's errors in the IPA memorandum that supported the IPA's original submission of a sourcing agreement. Staff also recounted its own review of the Black and Veach [sic] facility cost report, which Staff portrays as projecting a much lower output level than the 47,799,714 MMBtu that was included in the IPA's sourcing agreement. Based on these considerations, Staff originally was compelled to conclude that this 47,799,714 MMBtu was also likely a scrivener's error.

(*Id.*)

Beyond overstating the impacts of the IPA scrivener's error, the above paragraph is extraneous to the discussion of the issue or the ultimate conclusion that Staff advocates.

Staff also appropriately recommends that the Commission defer to IPA's conclusion related to the Monthly Base Overage Amount reflected in the IPA-approved final draft sourcing agreement. Staff includes replacement language for sub-section III.F of the Proposed Order on Rehearing to memorialize this position, as well as to affirm their position on the Annual Output. (*See id.* at 6-7.) Chicago Clean Energy has no objection to Staff's proposed modifications to sub-section III.F and has incorporated those changes into its replacement language attached hereto as Attachment A.

V.

REPLY TO AMEREN

Significantly, Ameren does not oppose the conclusions in the Proposed Order on Rehearing regarding the following matters:

- Affirmation of the IPA's prior determination of Annual Output;
- Affirmation of the IPA's prior determination of Monthly Base Overage Amount;
- Inclusion of the Attorney General's compromise language into the Proposed Order on Rehearing, and the accompanying removal of Section 6.1(c) from the sourcing agreement.

(*See generally* Ameren Brief on Exceptions.) Ameren takes up only a single issue in its Brief on Exceptions at stage in the proceeding, standing alone as the only party to suggest that the Commission impose a third party guarantee requirement into the IPA-approved final draft sourcing agreement. Ameren's position is curious, since the third party guarantee issue was initially raised by Staff, not Ameren, and even at the point at which Staff raised the issue, Staff candidly noted that the Commission's statutory authority to impose a third party guarantee was unclear, at best. (*See* Staff December 16, 2011 Statement of Position at 3 ("It is not clear to the Staff that the matter discussed *infra.* [the imposition of a third party guarantee] is clearly within the Commission's authority to impose under Section 9-220(h-4) as amended.").) The Proposed Order on Rehearing declines to impose a third party guarantee, and Staff now expresses no objection to that position.

Nonetheless, Ameren now requests that the Commission abandon its reasoning in the Proposed Order on Rehearing and reinsert the third party guarantee requirement. Ameren's position is both ironic and unpersuasive: Ameren relies upon Staff's prior position – which Staff has now abandoned – to argue for a modification to the Proposed Order on Rehearing to reinsert

a the third party guarantee provision, the legality of which Staff itself questioned when it made the suggestion. (*See* Ameren Brief on Exceptions at 2.) The action that Ameren requests is contrary to both the Commission's authority and the substantial evidence that the guarantee is not necessary.

Ameren rather confusingly suggests that, under Section 9-220(h-1)(4), "it stands to reason the Commission can, and should, insist on a guarantee of substance." (*Id.* at 3.) As CCE has amply demonstrated earlier, Section 9-220(h-1)(4) says nothing about the Commission's authority to impose such a requirement; on the contrary, the Act specifically limits the Commission's authority such that the Commission is *not* supposed to alter the IPA-approved final draft sourcing agreement, except with respect to specific items, one of which is *not* consumer savings provisions.

The General Assembly set forth a comprehensive set of obligations upon the facility, none of which required a third party guarantee. (*See* CCE Initial Comment 29-33; 220 ILCS 5/9-220(h-1)(1)-(17).) The Commission may not, at the unsupported insistence of a party, extend its authority beyond that conferred by statute. (*See, e.g., Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 60, 923 N.E.2d 1259, 1268 (1st Dist. 2010), *aff'd* 955 N.E.2d 1110 (Ill. 2011).) The Act does not require that CCE find a third party guarantor for the $100 million guaranteed savings to customers, instead holding CCE responsible for the guarantee. (*See* 220 ILCS 5/9-220(h-2)(6).)

Indeed, developments in the legislation and in this proceeding undercut Ameren's suggestion that "it stands to reason" that the Commission has the authority to impose additional guarantees. As detailed in CCE's Initial Comments on Rehearing, at 31-32, the General Assembly already has considered how to strengthen the guarantee of savings and has revised the

legislation to increase the developer's initial deposit into the Consumer Protection Reserve Account, from $100 to $150 million. (*Compare* 220 ILCS 5/9-220(h-2) *with* SB 3388 (96th General Assembly) (Enrolled), 9-220(h-2).) Then, after the Commission proposed to include a third party guarantee in the Sourcing Agreement, both the Senate and the House addressed the Commission's lack of authority to impose additional guarantee requirements. (*See* SR 585; HR 755.) Finally, Staff, at whose behest the third party guarantee was originally adopted by the Commission, modified its position, stating that "[t]his issue may be one best left to the General Assembly." (*See* Staff Reply Comment on Rehearing 12.) The Commission lacks the authority to do what Ameren now asks.

Even if the Commission possessed such authority, the original IPA-approved mechanism for enforcing the Savings Guarantee, now preserved by the Proposed Order on Rehearing, was a sophisticated compromise that adequately guaranteed consumer savings. (*See* CCE Initial Comments on Rehearing 30, 33-35.) In its Initial Comments, CCE described several studies (including the Summary Appraisal Report for Indiana Coal Gasification Plant and the Brattle Group Analyses) which show that the residual value of the CCE facility is adequate assurance of the consumer savings guarantee. (*Id.* at 33-34.) The Commission Staff agreed on rehearing that the Sourcing Agreement, without the third party guarantee, adequately protects consumers, and the Proposed Order on Rehearing agrees with Staff. (*See* Proposed Order on Rehearing 33.) That judgment should not be overturned now, especially when Ameren forwards no new evidence or plausible argument regarding the necessity of the third party guarantee.

VI.

CONCLUSION

WHEREFORE, for the reasons stated herein, Chicago Clean Energy, LLC respectfully requests that the Commission

1. Modify the Proposed Order on Rehearing consistent with the exceptions set forth herein, in the Brief on Exceptions of Chicago Clean Energy, LLC and the proposed replacement language attached thereto as Attachment A;

2. Approve a Sourcing Agreement consistent with the version of the Sourcing Agreement that is attached to the proposed replacement language (including with the modifications to scrivener's and typographical errors as identified on the chart presented as Attachment C to the Brief on Exceptions of Chicago Clean Energy, LLC);

3. Grant expedited Oral Argument to address the complex statutory framework, the threat to financeability posed by certain aspects of the Proposed Order on Rehearing, and related issues integral to the development of the Chicago Clean Energy project, including "billing determinants" and the percentage of costs recoverable under the sourcing agreement; and

4. Grant such other relief as required to advance the interests of justice.

Respectfully submitted,

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